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**SUSAN LAPSLEY**  
Director

**ENDORSED FILED  
IN THE OFFICE OF**

**2009 MAR 17 PM 12:13**



*Debra Bowen*  
DEBRA BOWEN  
SECRETARY OF STATE

Date: March 17, 2009

To: Antonio Guillen

From: Chapter Two Compliance Unit

Subject: **2009 OAL DETERMINATION NO. 6(S)**  
**(CTU 2009-0217-01)**  
(Summary Disposition issued pursuant to Gov. Code, sec.  
11340.5; Cal. Code Regs., tit. 1, sec. 270(f))

Petition challenging the amendment to California Code of  
Regulations, title 15, sections 3133 (renumbered from 3147) and  
3136 by the Department of Corrections and Rehabilitation.

On February 17, 2009, you submitted a petition to the Office of Administrative Law (OAL) asking for a determination as to whether the amendments by the Department of Corrections and Rehabilitation (Department) to California Code of Regulations, title 15, sections 3133 (renumbered from 3147) and 3136 are underground regulations.

In issuing a determination, OAL renders an opinion only as to whether a challenged rule is a "regulation" as defined in Government Code section 11342.600, which should have been, but was not adopted pursuant to the Administrative Procedure Act (APA).<sup>1</sup> Nothing in this analysis evaluates the advisability or the wisdom of the underlying action or enactment. OAL has neither the legal authority nor the technical expertise to evaluate the underlying policy issues involved in the subject of this determination.

California Code of Regulations, title 15, section 3133 describes the general procedures for disposition of incoming and outgoing mail for inmates and section 3136 describes the procedures for disapproval of inmate mail. The Department conducted a rulemaking and adopted regulations that were filed with the Secretary of State on July 17, 2008. The regulatory action renumbered section 3147 to section 3133 and made amendments to sections 3133 and 3136.

Your petition alleges that prior to being renumbered to section 3133, section 3147 included a subsection "allowing prisoners to return the disallowed mail to an approved correspondent." The previous section 3147 included a requirement that disallowed incoming mail be "destroyed or mailed at the inmate's expense to an approved outside correspondent." Your petition also alleges that section 3136 was amended to delete references to the previous subsections in section 3147 that related to this requirement and to move a subsection regarding the disposition of disallowed outgoing mail to section 3133. Your petition objects to these amendments.

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<sup>1</sup> Such a rule is called an "underground regulation" as defined in California Code of Regulations, title 1, section 250, subsection (a).

If a rule meets the definition of a regulation in Government Code section 1342.600, but was not adopted pursuant to the APA, it may be an "underground regulation" as defined in California Code of Regulations, title 1, section 250:

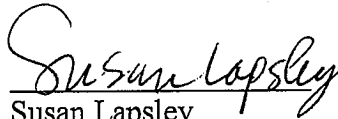
The following definitions shall apply to the regulations contained in this chapter:  
(a) "Underground regulation" means any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, including a rule governing a state agency procedure, that is a regulation as defined in Section 11342.600 of the Government Code, *but has not been adopted as a regulation and filed with the Secretary of State pursuant to the APA* and is not subject to an express statutory exemption from adoption pursuant to the APA. (Emphasis added.)

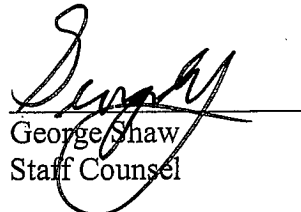
The sections you challenge as underground regulations, California Code of Regulations, title 15, section 3136 and former section 3147 (renumbered to 3133), were originally adopted and filed with the Secretary of State on October 7, 1982. The most recent amendments to these sections were made pursuant to the requirements of the APA, and were filed with the Secretary of State on July 17, 2008.

Sections 3313 and 3136 have been adopted as regulations and filed with the Secretary of State pursuant to the APA. The challenged rules are not, therefore, underground regulations.<sup>2</sup>

The issuance of this summary disposition letter does not restrict your right to adjudicate the alleged violation of section 11340.5 of the Government Code.

Date: March 17, 2009

  
Susan Lapsley  
Director

  
George Shaw  
Staff Counsel

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<sup>2</sup>A rule which is contained in a properly adopted regulation is the proper subject of a summary disposition letter. California Code of Regulations, Title 1, section 270, subdivision (f) provides:

- (f)(1) If facts presented in the petition or obtained by OAL during its review ... demonstrate to OAL that the rule challenged by the petition is not an underground regulation, OAL may issue a summary disposition letter stating that conclusion. A summary disposition letter may not be used to conclude that a challenged rule is an underground regulation.
- (2) Circumstances in which facts demonstrate that the rule challenged by the petition is not an underground regulation include, but are not limited to, the following:
- (A) The challenged rule has been superseded.
  - (B) The challenged rule is contained in a California statute.
  - (C) *The challenged rule is contained in a regulation that has been adopted pursuant to the rulemaking provisions of the APA.*
  - (D) The challenged rule has expired by its own terms.